No. 83-1652

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IN THE

Supreme Court of the United States

October Term, 1983

Papago Tribal Utility Authority,
Petitioner,

v.

Federal Energy Regulatory Commission,
Respondent.

On Petition For a Writ Of Certiorari
To The United States Court of Appeals
For The District of Columbia Circuit

Appendix to Petition For A Writ of Certiorari

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ORDER ON REMAND OF THE FEDERAL ENERGY REGULATORY COMMISSION JANUARY 25, 1982

APPENDIX A

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners:

C.M. Butler III, Chairman;
J. David Hughes and A.G. Sousa.

Arizona Public Service Company) Docket No. ER76-530

ORDER ON REMAND
(Issued January 25, 1982)

This proceeding involves an application filed with the Federal Power Commission in the above-captioned docket on February 26, 1976, by Arizona Public Service Company (Arizona) seeking approval of approximately $4.5 million annually in its rates for wholesale electric service. Among Arizona's wholesale customers affected by the proposed increase are Arizona Electric Power Cooperative, Inc. (AEPCO), Papago Tribal Utility Authority (PTUA) and Electrical District No. 1 (ED-1). In its suspension order of March 31, 1976, the FPC held, over the customers' objections, that Arizona's contracts with AEPCO, PTUA and ED-1 authorized the filing of the proposed increase under section 205 of the Federal Power Act. The FPC accepted Arizona's rates for filing, suspended their operation for 30 days until May 1, 1976, and set the matter for hearing.

The FPC's decision to accept Arizona's proposed section 205 rate increase to the above-noted wholesale customers was appealed to U.S. Court of Appeals for the D.C. Circuit. On August 21, 1979, the court issued its decision in the appeal, *Papago Tribal Utility Authority* v. *F.E.R.C.*, 610 F. 2d 914, holding that the Arizona-AEPCO contract did permit a filing under section 205 of the act, but that the PTUA and ED-1 contracts did not. The court held that the latter agreements authorized rate revisions only prospectively from the date of a Commission order in a section 206(a) proceeding. The court remanded the FPC's suspension and related orders to this Commission for further proceedings consistent with its opinion. The court left open the questions of whether a new proceeding would be necessary on remand and whether the *Mobile-Sierra*[1] burden of proof must be employed in determining any increase in rates to PTUA and ED-1 under section 206.

Meanwhile, the hearing ordered by the FPC was held and concluded. The presiding judge issued his initial decision in the case on December 19, 1977, approving in part Arizona's proposed increase in rates. On August 1, 1978, this Commission affirmed the judge's decision.

On October 9, 1979, PTUA filed a motion requesting the Commission to take a number of actions in the captioned docket and two succeeding Arizona rate dockets[2] in response to the court's decision. In docket No. ER76-530, PTUA requests the Commission to order Arizona to refund all amounts collected in excess of the contract rate and to rule that any rate increase approved as to PTUA under section 206 must meet the full *Mobile-Sierra* burden of proof. On October 12, 1979, Arizona filed a motion for an order on remand. Arizona argues that no further hearings

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[1] *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956)

[2] Docket Nos. ER78-145 and ER79-126.

are necessary, that the full *Mobile-Sierra* burden of proof need not be met, and that the Commission approved rates should be applied to PTUA and ED-1 as of August 1, 1978, the date of the Commission's final decision herein. PTUA answered in opposition to Arizona on October 29, 1979; Arizona answered in opposition to PTUA on October 31; and on November 7, PTUA filed a reply to Arizona's response.

On October 30, 1979, ED-1 filed a motion for an order on remand and a response to the Arizona and PTUA motions. ED-1 argues that under the provisions of Commission-approved settlement agreements in Docket Nos. ER77-521 and ER78-145, the parties agreed that if the court's decision did not clearly decide the burden of proof issue, which in fact it did not, the parties would "meet and seek to settle" any questions arising from the court's decision. ED-1 argues that the Commission should rule that the motions of both Arizona and PTUA are premature. It requests the Commission to convene a conference pursuant to section 1.18 of the rules of practice and procedure and the settlements for the purpose of determining the issues presented by the court's decision. ED-1 also expresses opposition to Arizona's request that the Commission enter an order making the previously approved rates effective in Docket No. ER76-530 as of August 1, 1978.

Insofar as the present Docket No. ER76-530 is concerned, the Commission does not agree with ED-1 that the motions of Arizona and PTUA are premature. Arizona points out that the settlement provisions require a settlement conference only if the court's decision does not clearly rule as to the burden of proof issue and if subsequent

proceedings ordered by the court do not settle this question. In this order the Commission shall, in accordance with the court's remand, consider and decide the burden of proof issue. Consequently, there does not appear to be any need for a settlement conference on this issue in this docket either under the settlement agreements or otherwise. In view of the respective positions of PTUA and ED-1 on the one hand and Arizona on the other, it is clear that a settlement conference on the burden of proof issue would be unavailing in any event. ED-1's request to defer action in this docket pending a conference among the parties is therefore denied.

With respect to the motions for an order on remand, the Commission finds itself in agreement with Arizona and will adopt its recommendations. Despite the extensive arguments raised by PTUA, we find its position to be without merit.

First, with respect to the matter of burden of proof, we find no basis to require that the stringent *Mobile-Sierra* burden of proof be made applicable. It is our view that the *Mobile-Sierra* cases establish the applicable standards governing rate increases which may be allowed in cases where the utility and its customer have entered into a fixed rate contract, that is a contract which does not authorize the utility to seek an increase under either sections 205 or 206. Under *Mobile-Sierra,* a utility with a fixed rate contract is theoretically entitled to a rate increase notwithstanding the contract if it can show that the contract rate is "so low as to adversely affect the public interest—as where it might impair the financial ability of the public utility to continue its service, cast upon other customers and excessive burden, or be unduly discriminatory." (350 U.S. 355). The burden of proof in such cases is extremely difficult if not impossible to meet. We are not aware of any case arising under the Federal

Power Act in which rate relief has been granted under the *Mobile-Sierra* standard. See *e.g.* Opinion No. 764, *Metropolitan Edison Company*, Docket No. E-8832, issued June 1, 1976.

The contracts at issue here, however, are not fixed rate contracts. The language of the Arizona-PTUA contract reads in pertinent part as follows:

> 3.6 The rates hereinabove set out in this Section 3 and Exhibits thereto are to remain in effect for the initial one (1) year of the term of this contract and thereafter unless and until changed by the Federal Power Commission or other lawful regulatory authority, *with either party hereto to be free unilaterally to take appropriate action before the Federal Power Commission or other regulatory authority in connection with changes which may be desired by such party.* (emphasis added)

We hold that under the terms of this contract, Arizona was entitled unilaterally to file a rate increase application with the Commission, but that, consistent with the court's decision herein, any increase ultimately approved can be made effective only prospectively. The latter circumstance, however, does not lead to the conclusion that the *Mobile-Sierra* burden of proof must be applied in determining the rates to be allowed. While the contracts in question admittedly do not specify whether a rate increase request by Arizona would be considered under section 205 or 206 of the Act, nevertheless, there can be no reasonable doubt that the contracts authorize the filing of a rate increase application by Arizona. These contracts are therefore not fixed rate

contracts and the law of the *Mobile* and *Sierra* cases is not applicable to them. To apply the *Mobile-Sierra* standard, thereby effectively precluding any change in the contract rate, would in our judgment be arbitrary and grossly unfair, as well as directly contrary to the express terms of the contracts. We find no basis in the parties contracts, the statute, or the applicable case law requiring imposition of the *Mobile-Sierra* burden of proof in a case such as this. We believe the proper standard is the just and reasonable standard incorporated in section 206 and that in accordance with the standard, Arizona's rates should be determined by reference to its fully allocated costs, consistent with the Commission's normal ratemaking methods. Accordingly, we conclude the *Mobile-Sierra* burden of proof does not apply.

We likewise reject the proposition that a new proceeding is required as a result of the court's order.[3] The hearing in this docket was held under sections 205 and 206 of the act. Both sections provide for the establishment of just and reasonable rates; the principal difference between them is the suspension and refund procedures of section 205 as contrasted with the prospective effect of orders resulting from proceedings under section 206. It appears to us that to hold a new hearing in this docket would be duplicative of the hearing already held and would represent a waste of the Commission's resources as well as the parties' resources, all with the likelihood that any decision reached would conform to that already rendered.

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[3]The court in *Papago* specifically stated that its decision was not meant to imply that a new proceeding would be required. *See* 610 F. 2d 930, footnote 127.

We believe the most reasonable thing to do under the circumstances is to make the rates heretofore approved in this docket applicable to sales to PTUA and ED-1 effective on August 1, 1978, the date of the Commission's final decision in this docket. The effect of this action would be to place all parties in the position they would have been in had the FPC in its prior orders interpreted the PTUA and ED-1 contracts as required by the court's decision. We firmly believe the Commission has the responsibility and authority to place the parties in the same position they would have been in if the FPC had ruled correctly in the first instance.

Section 206 requires the utility's pre-existing rates be found by the Commission to be unjust, unreasonable, unduly discriminatory or preferential before new just and reasonable rates can be approved and made effective. We have examined Arizona's pre-existing rates in relation to the costs found in the order of August 1, 1978, to be properly allocable to PTUA and ED-1. Our review indicates that the existing rates produce a return which is unreasonably low.[4]

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[4]Based on data contained in Arizona's compliance filing of November 3, 1978, in this docket, Arizona's earned rate of return at existing rates on its service to PTUA would be .552 percent. A similar comparison for ED-1 is not possible since the service did not commence until March 22, 1976. Test year revenue data for the ED-1 service are not available in the record. However, the rate approved in the order of August 1, 1978, applicable to ED-1 is substantially higher than the pre-existing rate. To the extent of difference between the old and new rates the old rate is less than compensatory based on fully allocated costs and resulted in a rate of return below that found in this proceeding to be just and reasonable. The rate approved for ED-1 is the same as the rate approved for Arizona's other irrigation resale customers. As to those cutomers, whose rates were established under section 206, the presiding judge specifically found that the pre-existing rates were unjust, unreasonable and unlawful and that Arizona should be permitted prospectively to increase such rates to the just and reasonable level. We conclude that

Continuation of the existing rates would not allow Arizona to earn the just and reasonable rate or return (9.41 percent) approved in the August 1, 1978, order. On this basis we conclude that the existing rates are not just and reasonable under the standard of section 206(a) and should be adjusted as of August 1, 1978, to conform to the just and reasonable rates established by the Commission in this docket.

On January 14, 1980, intervenor Citizens Utilities Company (Citizens) filed a motion seeking essentially the same relief as PTUA. It appears however that Citizens' motion has subsequently become moot. In a settlement approved by the Commission on November 13, 1981, in docket No. ER81-179, Citizens agreed that Arizona's rate filings affecting Citizens, including that in Docket No. ER76-530, were properly held to be subject to section 205 of the Federal Power Act. As part of the settlement, Citizens agreed to abandon and retract its pending motions seeking relief based on the non-applicability of section 205. Based on these facts Citizen's motion of January 14, 1980, is deemed withdrawn.

On September 28, 1981, PTUA filed a petition requesting the Commission to reopen the record in this case for an evidentiary hearing on the burden of proof issue. Basically PTUA argues that it was the understanding of the parties at the time the Arizona-PTUA contract was negotiated in 1971 that the rate specified in the contract was intended to be in

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Arizona's pre-existing rate to ED-1 must likewise be considered unjust and unreasonable under the terms of section 206 and should be adjusted as of August 1, 1978, to conform to the just and reasonable rate. We perceive no reasonable basis or legal requirement to establish a rate for ED-1 different from that approved in the August 1, 1978, order for Arizona's other section 206 irrigation resale customers.

the nature of a fixed rate and can be increased only if the so-called *Mobile-Sierra* burden of proof is met by Arizona.

In support of its request, PTUA cites to an order issued on September 24, 1981, in Arizona's rate docket ER81-179, in which the Commission referred to the rate change provision of the Arizona-PTUA contract as ambiguous. PTUA argues that where an ambiguity exists, the Commission must look beyond the four corners of the contract and must analyze the parties' intentions at the time the contract was entered into. PTUA provides four exhibits consisting of affidavits from two individuals involved in the negotiation of the Arizona-PTUA contract[5] and two contemporaneous (1970) letters from Arizona, one to PTUA and the other to R.W. Beck and Associates, submitted in connection with contract. PTUA submits these exhibits as evidence of the parties' intent to place a limit on Arizona's future rate increases. On October 2, 1981, PTUA filed a supplement to its petition to reopen accompanied by several additional documents.[6]

On October 9, 1981 Arizona filed a preliminary response in opposition to PTUA's petition to reopen and on November 16, 1981, filed its answer. Arizona argues that

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[5]Mr. John T. McGue, member of PTUA's board of directors; Mr. G.I. Valdez, former project controller for Hecla Mining Company (PTUA was purchasing power from Arizona for resale to Hecla for use at Hecla's copr . .nining operations on the Papago reservation).

[6]These documents include (1) a draft of the Arizona-PTUA contract dated January 19, 1971, (2) a Hecla Mining Company internal memorandum dated December 15, 1970, (3) a Hecla internal memorandum dated July 1, 1970, (4) a draft of PTUA's proposal to provide service to Hecla, (5) technical explanations of contract adjustment factors and rate components apparently prepared by Arizona and provided by PTUA to Hecla, and (6) a September 1, 1970, internal Hecla memorandum.

the Arizona-PTUA contract imposes no restriction on Arizona's right to seek rate changes. It further argues that relevent contemporaneous documents, notably the May 28, 1971, contract between PTUA and Hecla Mining Company, compel the conclusion that all parties recognized Arizona's right to seek a rate change after expiration of the initial one year term of the contract. PTUA filed a reply on December 2, 1981.

The basic question involved in this dispute is what was the parties' intent. *Pennzoil Company et al.* v. *F.E.R.C.*, 645 F.2d 360, 388 (C.A. 5 1981). More specifically the question is whether, notwithstanding the specific rate change provisions of the Arizona-PTUA contract, the parties intended that there should be a limit or restriction upon Arizona's right to seek rate changes.

We conclude that the language of the contract is not reasonably susceptible to the interpretation suggested by PTUA. *Lucie v. Kleen-Leen, Inc.*, 499 F.2d 220 (7th Cir. 1974). Section 3.1 of the Arizona-PTUA contract sets out the initial contract rates and states that such rates shall be "applicable during the initial one (1) year period hereof, and thereafter unless and until changed as hereinafter provided in section 3.6 hereof. . ." Section 3.6 of the contract has been referred to earlier and is quoted on page 4 of this order. This section provides that after one year either party to the contract is free unilaterally to seek changes in rates "which may be desired by such party." Section 3.6 contains no limitation such as that suggested by PTUA and in our judgment there is no credible evidence upon which to conclude that such a limitation was intended by the contracting parties.

Inasmuch as the proffered documents attempt to modify or contradict rather than to explain or interpret the contract language, the Commission is not required to consider them further. Since, however, the Commission has reviewed the documents to determine their purpose, we further conclude from our review that none of these documents supports the conclusion that the parties contemplated the rate change limitation suggested by PTUA. We decline to give substantial weight to the affadavits. These latter documents were prepared long after the relevant contracts were negotiated, they are subjective and largely self-serving, and they do not demonstrate mutuality of intent.

The Commission further finds that the order of September 24, 1981, in Docket No. ER81-179 in no way supports PTUA's petition to reopen. The ambiguity mentioned by the Commission in that order referred to the basic issue before the court in *Papago*, namely whether the contract provided for a rate change under section 205 or 206 of the Federal Power Act. The question there was whether the company's rate increase could become effective following suspension under section 205 or whether it could become effective only prospectively under section 206. The court adopted the latter interpretation thereby removing the ambiguity.

The Commission orders:

(A) Within 75 days from the date of this order, Arizona shall refund to PTUA and ED-1 all increased amounts collected from them in this docket prior to August 1, 1978, together with interest at the rates specified in section 35.19a of the Commission's regulations. Within 10 days thereafter

Arizona shall submit a statement showing the computation of refunds and interest paid.

(B) PTUA's petition to reopen the record is denied.

(C) Upon compliance of Arizona with the terms of paragraph (A) above, this proceeding shall be terminated.

By the Commission.
Commissioner Hughes Concurred with a separate statement attached.

Kenneth F. Plumb,
Secretary.

Arizona Public Service Company) Docket No. ER76-530

(Issued January 25, 1982)

HUGHES, COMMISSIONER, *concurring:*

I welcome an opportunity to express separately my views on the difficult questions that this Commission must contend within the area of contractual provisions limiting utilities' ability to effect rate changes. More particularly, I wish to express some reservations I have about the order issued by the Commission in this case insofar as it seems to create two standards within section 206 of the Federal Power Act.

It is my opinion that section 206 contains but a single standard by which the Commission can disallow existing

rates and charges and that standard is defined by the phrase "unjust, unreasonable, unduly discriminatory or preferential." I have doubts as to the wisdom of following a procedure by which that statutory standard may be altered or given different meanings by the wording of a contract between a utility and its customer. A more fundamentally sound approach is to view the standard as a unitary one, but to look to a contract to determine the extent to which a utility has, by contract, limited or foresworn its right to invoke its pre-existing rights under either section 205 or section 206 of the Power Act.

Specifically, the order states, at page 4:

> We believe the proper standard is the just and reasonable standard incorporated in section 206 and that in accordance with the standard, Arizona's rates should be determined by reference to its fully allocated costs, consistent with the Commission's normal ratemaking methods. Accordingly, we conclude the *Mobile-Sierra* burden of proof does not apply.

This discussion, perhaps unintentionally, seems to proceed from a notion that there is a *Mobile-Sierra* standard that is somehow different from the just and reasonable standard that applies, for instance, to this case. The ambiguity lurking in that notion may be dispelled by noting that the Commission refers to *Mobile-Sierra* as a *burden of proof*, not a *standard*. And that, I think, comes closer to my understanding of these cases. A full-Sierra contract does not establish a different standard than a moving-Mobile contract, but acts instead as a limitation on the arguments and proofs a utility can advance to satisfy the standard. The D.C. Circuit concluded in the decision remanding this case to us, *Papago Tribal Utility Authority v. FERC*, 610 F.2d 914 at 929 (D.C. Cir. 1980):

> As we have had occasion to observe, the *Mobile-Sierra* doctrine is "refreshingly simple: The contract between the parties governs the legality of the filing. Rate filings consistent with contractual obligations are valid; rate filings inconsistent with contractual obligations are invalid." [footnote deleted]

It may be useful to begin this analysis with a review of the options available to a utility outside of any contractual commitments. First, it may establish a rate change upon 60 days notice following the procedures of section 205(d) of the Power Act. A second option recognizes that the company is free to establish any effective date for new rates beyond 60 days in the future.[1] Under this option, it may specify that the rates will become effective upon the Commission's issuance of a substantive order. A utility has, as a third option, the right to complain under section 206 against its own rates, that it, petitioning the Commission to investigate their justness and reasonableness and upon a finding that they are not just and reasonable to establish new rates, hoping, of course, that the Commission will prescribe the rates suggested by the utility.

The *Mobile-Sierra* line of cases teaches that a utility may by contract bargain away some of these options or agree to conditions precedent to their exercise. In the simplest case, a utility gives up its right to file rate increase to be effective on 60 days notice. It then preserves the right to file rate increases subject to section 205(d), but to be effective only

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[1] 18 C.F.R.§35.3(a) requires Commission permission for an effective date more than 120 days from the filing date. In addition, 18 C.F.R. §35.2(e) seems to require a Commission waiver for any effective date other than 60 days after filing.

after a Commission order. It can also foreswear that right, as the court found the utility to have done in this case. The utility has closed off all its avenues under section 205, but still retains the right to file a complaint under section 206 to cause the Commission to investigate its rates. In the special situation of the fixed rate contract, as was present in the *Mobile* and *Sierra* cases, the company can be found to have foresworn the right to invoke section 206 *for its own interest,* and thus its complaint under section 206, while still invoking the just and reasonable standard, must invoke a public interest rather than its private interests as the predicate to the Commission's finding that its rates and charges are not just and reasonable. It is worth emphasizing that what is ultimately to be protected through any exercise of our section 205 and 206 powers is a public interest in prices that are fair to both buyer and seller of electric power. The Power Act does not give primacy either to economic health of the utility or to consumer protection. It requires us to pursue both goals, because in the end, one is meaningless if the other is trammeled. That is why section 206 is a two-way street which enables the Commission to make upward, downward to lateral rate adjustments required to fulfill the ultimate public purposes of the Act.

In discussing the distinctions between procedures under section 205 and section 206, the courts in the *Mobile-Sierra* cases and in later Court of Appeals cases have focussed on differences in the timing of rate increases.[2] Other distinctions are more subtle, but perhaps sometimes more important.

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[2]Under Section 206, rate changes can take effect only prospectively from the date of a Commission order, but as I have said above, that result is also available to a utility under section 205 procedures. Section 205, on the other hand, absent a contractual bar, permits increases to become effective on 60 days notice subject to the Commission's power to affect the timing of an increase through the suspension and refund mechanisms, but these would be nonsensical in connection with a prospective increase.

The first is the conceptual focus and required findings of an investigation. In a section 205 case, the existing rates are extinguished by the mere fact of the utility's filing, either at the effective date designated by t. e utility or at the end of any suspension period set by the Commission. Under section 206, however, the lawfulness *vel non* of existing rates is, in a juridical sense, the central issue at the outset of the investigation. Existing rates can be extinguished only if the commission finds them unjust and unreasonable. And that finding is a necessary predicate which must be met before the commission can prescribe new rates to be effective prospectively. Thus, a section 206 case automatically involves both an inquiry into the old rate levels and into the new rate levels. This distinction is not often meaningful during the trial of a case under the Commission's current practice,[3] but it cannot be ignored in the Commission's final disposition or on judicial review.

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[3]We recently discussed this in *Illinois Power Company*, 17 FERC ¶ 61,064, at footnote 7:

> We note that there is little practical difference in a non-Sierra Section 206(a) and a Section 205-with-a-prospective-effective-date proceeding. In both cases, no rates are collected subject to refund or prior to Commission approval of the new rate level. The only important difference is whether the Commission must find the proposed new rate unjust and unreasonable before setting the lawful rate, or whether it must find the old contract rate unjust and unreasonable before setting the lawful rate. Since proposed rates are evaluated from the ground up in either case, as discussed *infra*, there is little difference in results. We note that in the past the Commission has interpreted similar contract language (absent extrinsic evidence to the contrary as is present here) as providing for a section 206(a) proceeding with a just and reasonable burden of proof. See

A second distinction, highlighted in *Public Service Commission of New York v. FERC*, 642 F.2d 1335 (D.C.Cir. 1980), cert. denied October 5, 1981 is the allocation of the burden of proof. Ordinarily, under section 205 the utility must carry the burden of supporting increases in its rates.[4] Under section 206, the Commission may well ber the burden of supporting the prescribed rate even if the moving party has carried the initial burden of proving the existing rate unjust and unreasonable under the Administrative Procedure Act, 5 U.S.C. §556(d). I think it is undesirable as an ordinary matter for the Commission to be in the position of bearing the burden of establishing rate increases sought by utilities and I think that in most instances it would be advantageous for a utility to carry that burden itself, since its revenues are at risk. For these reasons, it would seem to me best for the Commission, as its general policy, to require a clear expression in a contract that a company has sworn away its rights to use section 205

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i.e., pp. 5-6, *supra*. However, this was because the Commission, prior to the *Kaukauna* case [*City of Kaukauna v. FERC*, 581 F.2d 993 (D.C. Cir. 1978)] believed that a section 206(a) proceeding was the only course available under the Federal Power Act for achieving a prospective only effective date. The Court in *Kaukauna* made it clear that this was not the case and that a section 205 proceeding with a delayed effective date could also achieve this result and must be considered as a possible interpretation of such a contract. 581 F.2d at 997-8.

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[4]In the *Public Service Commission* decision, known more familiarly as the Transco decision, the Court held that the Commission had the burden of proof as to a modification of the utility's filed rate design, where that modification involved use of the Commission's powers under section 5 of the Natural Gas Act, which is the courterpart of section 206 of the Power Act.

rate-changing procedures. Thus, I would be disposed to resolve most contractual ambiguities in favor of a prospective section 205 filing rather than a section 206 requirements.

The court in this case, however, was not presented with the *Kaukauna* option. The Commission had decided that the contract language here in dispute permitted a garden-variety suspendible section 205 filing. The Court held squarely that the Commission was wrong and accepted the customers' argument that a section 206(a) filing was intended. The Court's language leaves us no choice but to treat this as a section 206 case. Accordingly there has been no need for me to consider whether the contract language in this case is susceptible of a *Kaukauna* interpretation, or what other language might permit that interpretation.

As to the remaining steps in this decision, I am in full agreement with my colleagues. There is no suggestion in this proceeding that the company has foresworn its right to invoke its own private interest through a section 206 complaint filing. This case, therefore, is not a *Sierra* case. I further agree that in today's circumstances, the contract rates for Papago Tribal Utility Authority are unjust and unreasonable to the company and that the contract rates for the Electric District 1 are unduly discriminatory and for that reason are unjust and unreasonable. The Commission's prescription of new just and reasonable rates in the instant order is, therefore, entirely proper.

J. David Hughes

APPENDIX B

NOTICE OF DENIAL OF APPLICATION FOR REHEARING ISSUED BY THE FEDERAL ENERGY REGULATORY COMMISSION MARCH 26, 1982

APPENDIX B

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Arizona Public Service Company	)	Docket No. ER 76-530-001

NOTICE OF DENIAL OF APPLICATION FOR REHEARING

(Issued March 26, 1982)

On February 24, 1982, Papago Tribal Utility Authority filed an application for rehearing of the Commission's order issued in captioned proceeding on January 25, 1982.

Take notice that the Commission agreed at its meeting of March 23, 1982, to take no action on the application for rehearing, and accordingly the application is denied pursuant to section 1.34(c) of the Commission's rules of practice and procedure.

Kenneth F. Plumb,
Secretary.

APPENDIX C

PAPAGO TRIBAL UTILITY v.
FEDERAL ENERGY REGULATORY COMMISSION,
723 F.2d 950 (D.C. Cir., 1983)

APPENDIX C

PAPAGO TRIBAL UTILITY AUTHORITY, Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, Respondent,

Arizona Public Service Company, Intervenor.

Nos. 82-1338, 82-1339.

United States Court of Appeals, District of Columbia Circuit.

Argued Jan. 21, 1983.

Decided Dec. 13, 1983.

As Amended Dec. 22, 1983.

Before EDWARDS and SCALIA, Circuit Judges, and VAN DUSEN,* Senior Circuit Judge of the United States Court of Appeals for the Third Circuit.

Opinion for the Court filed by Circuit Judge SCALIA.

SCALIA, Circuit Judge.

Papago Tribal Utility Authority petitions under 16 U.S.C. §825*l* (b)(1982) for review of an order of the Federal Energy Regulatory Commission approving an increase in rates paid to the Arizona Public Service Company. The issues on appeal are whether the parties' contract authorized the Commission to fix "just and reasonable" rates, whether the Commission's finding under § 206(a) of the Federal Power Act that prior rates were unjust and unreasonable was procedurally and substantively sound, and whether the new rates could be made effective as of a date before that explicit finding was made.

*Sitting by designation pursuant to 28 U.S.C. §294(d).

On February 26, 1976, the Arizona Public Service Company ("APS") filed with the Federal Power Commission a Notice of Rate Change affecting electricity rates to its wholesale for resale customers, including the Papago Tribal Utility Authority ("PTUA"). PTUA filed a *Protest, Petition to Intervene,* and *Motion to Reject,* alleging, inter alia, that its contract with APS did not permit unilaterally proposed rate changes under §205 of the Federal Power Act, 16 U.S.C. § 824d (1982). The Federal Power Commission held to the contrary, and permitted the filed rates to take effect May 1, 1976, pending investigation into their lawfulness and subject to refund on the basis of that investigation. *Arizona Public Service Co.*, 55 F.P.C. 1503, 1507-08 (1976) *(Order Accepting in Part, Rejecting in Part, etc.); Arizona Public Service Co.*, 56 F.P.C. 1834, 1837-38 (1976) (*Order Denying Application for Rehearing, etc.).* On August 1, 1978, the Federal Energy Regulatory Commission, statutory successor to the Federal Power Commission,[1] approved the proposed rates as just and reasonable, subject to minor adjustment and to corresponding refund for the period during which the unadjusted rates had been in effect. *Arizona Public Service Co.*, 4 FERC (CCH) ¶ 61,101 *("Order Affirming Initial Decision").*

In a previous appeal, this court disagreed with the Commission's interpretation of the contract between APS and PTUA, holding that it did not contemplate unilateral change under §205 of the Act, *Papago Tribal Utility Authority v. Federal Energy Regulatory Commission,* 610

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[1]In 1977, most functions of the Federal Power Commission were transferred to the Federal Energy Regulatory Commission. Department of Energy Organization Act, Pub.L. No. 95-91, § 402(a), 91 Stat 565, 583-84 (codified at 42 U.S.C. 7172(a) (Supp. V 1981)).

F.2d 914, 930 (1979) (*"Papago I"*). Reconsidering the contractual language on remand, the Commission found that it authorized a Commission-initiated proceeding to set just and reasonable rates under § 206 of the Act, 16 U.S.C. § 824e (1982). *Arizona Public Service Co.*, 18 FERC (CCH) ¶ 61,066, at 61,110 (Jan. 25, 1982) (*"Order on Remand"*). Concluding that a new hearing would be duplicative and wasteful, the Commission made an explicit finding (for the first time) that APS's pre-existing rates were not "just and reasonable," and made the rates approved in its 1978 Order effective from August 1, 1978 so as to put the parties in the position they would have occupied had the Commission initially interpreted the contract as later required by *Papago I*. *Id.* PTUA's *Application for Rehearing* was denied on March 26, 1982, *Arizona Public Service Co.*, 18 FERC (CCH) ¶62,582; this petition for review followed.

THE RATE-CHANGE STANDARD UNDER THE APS/PTUA CONTRACT

The Federal Power Act provides two routes for changing electricity rates: The seller may initiate rate changes under § 205 of the Act, by filing a new schedule, which is subject to Commission review for justness and reasonableness, but which takes effect immediately (after the sixty-day notice period required by subsection (d)), subject to Commission suspension of no more than five months pending investigation;[2] and the Commission itself may initiate rate

[2]Section 205, 16 U.S.C. § 824d (1982), provides:

> (a) All rates and charges made . . . by any public utility for or in connection with the transmission or sale of electric energy . . . shall be just and reasonable, and any such rate or

changes (usually, of course, upon application of one of the parties to the contract) under § *206, but only upon finding that the existing rates are unjust, unreasonable, unduly discriminatory or preferential.*[3]

These provisions permit essentially three contractual arrangements for revision. First, the parties may agree that new rates can be unilaterally and immediately imposed by the utility, subject, under § 205, to Commission

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charge that is not just and reasonable is hereby declared to be unlawful.

. . . . . .

(d) [N]o change shall be made by any public utility in any...rate...except after sixty days' notice.... Such notice shall be given by filing with the Commission...new schedules....

(e) Whenever any such new schedule is filed the Commission shall have authority...to enter upon a hearing concerning the lawfulness of such rate...; and, pending such hearing and the decision thereon, ...may suspend the operation of such schedule and defer the use of such rate,...but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings...the Commission may make such orders with reference thereto as would be proper in a proceeding inititated after it had become effective.

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[3]Section 206(a), 16 U.S.C. § 824e(a) (1982), provides:

Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate...collected by any public utility...is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate...to be thereafter observed and in force, and shall fix the same by order.

suspension for no longer than five months, and to ultimate Commission disallowance if they are not just and reasonable. Second, by broad waiver, the parties may eliminate both the utility's right to make immediately effective rate changes under § 205 and the Commission's power to impose changes under § 206, except the indefeasible right of the Commission under § 206 to replace rates that are contrary to the public interest, "as where [the existing rate structure] might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory."[4] *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348, 355, 76 S.Ct. 368, 372, 100 L.Ed. 388 (1956). Third, the parties may contractually eliminate the utility's right to make immediately effective rate changes under § 205 but leave unaffected the power of the Commission under § 206 to replace not only rates that are contrary to the public interest but also rates that are unjust, unreasonable, or unduly discriminatory or preferential to the detriment of the contracting purchaser. *See Public Service Co. of New Mexico v. FERC*, 628 F.2d 1267, 1270 (10th Cir. 1980), *cert. denied*, 451 U.S. 907, 101 S.Ct. 1974, 68 L.Ed.2d 295 (1981); *Louisiana Power & Light Co. v. FERC*, 587 F.2d 671, 676 (5th Cir. 1979). The first issue in the present case is whether the Commission was correct in concluding that the APS/PTUA contract adopted the last of these three

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[4]This apparently means unduly discriminatory or preferential to the detriment of purchasers who are not parties to the contract. Discrimination or preference that operates against the contracting purchaser can presumably be waived—just like unreasonableness—up to the point where it produces some independent harm to the public interest.

regimes. In approaching that question, we accord appropriate deference, though not of course conclusive validity, to the judgment of the expert agency that deals with such contracts regularly. *Kansas Cities v. FERC*, No. 81-2248, 723 F.2d 82 at 87 (D.C.Cir.1983).

The portion of the APS/PTUA contract that governs rates is Section 3. It sets forth a base monthly rate and a base monthly minimum, the former consisting of local facilities charge, demand charge, and energy charge, each subject to monthly adjustment. It also permits adjustments for reductions in maximum demand attributable to cancellation of PTUA contracts with third parties. Subsection 6, the last subsection of section 3, provides:

> The rates hereinabove set out in this Section 3 . . . are to remain in effect for the initial one (1) year of the term of this contract and thereafter unless and until changed by the Federal Power Commission or other lawful regulatory authority, with either party hereto to be free unilaterally to take appropriate action before the Federal Power Commission or other lawful regulatory authority in connection with changes which may be desired by such party.

In *Papago I*, we held that the contract did not permit unilaterally effected rate increases under § 205. In its *Order on Remand*, the Commission held that the contract permitted changes under § 206 on the basis of a just-and-reasonable standard.

PTUA makes essentially three objections to the Commission's conclusion. First, that the language of the contract excludes just-and-reasonable changes; second, that apart from the language, the reasoning of *Papago I* requires

such a conclusion; and third, that the issue deserved an evidentiary hearing. We find none of these objections well taken.

PTUA contends that the contractual language merely recognized the possibility of future rate change and that such recognition does not constitute an agreement to apply a just-and-reasonable standard in § 206 proceedings. We disagree. The contract draws a clear distinction between "the initial one (1) year," during which the originally specified rates "are to remain in effect," and subsequent years, during which those rates are to subsist "unless and until changed by the Federal Power Commission or other lawful regulatory authority." The limitation envisioned during the initial year cannot abridge the right of the parties to bring to the attention of the Commission during that period rates not in the public interest. The Commission's obligation to insure that rates do not violate that prescription is imposed for the direct benefit of the public at large rather than (like the prescription of just and reasonable rates) for the direct benefit of the seller and purchaser; and it therefore cannot be waived or eliminated by agreement of the latter. Even agreement not to bring a rate contrary to the public interest to the Commission's attention would be akin to a contract to suppress evidence, and therefore void. *See* RESTATEMENT OF CONTRACTS § 554 (1932); 14 WILLISTON ON CONTRACTS §1716 at 881 (3d ed. 1972); 6A CORBIN ON CONTRACTS § 1430 at 380 (1962). Thus, applying the principle that a contractual provision should, if possible, be interpreted in such a fashion as to render it lawful rather than unlawful (*ut magis valeat quam pereat*), the restriction envisioned during the first year of the contract must allow

rate changes required by the public interest. The scheme to be in effect "thereafter" — obviously intended to be less restrictive—must therefore permit changes that are just and reasonable.

Moreover, specific acknowledgment of the possibility of future rate change is virtually meaningless unless it envisions a just-and-reasonable standard. The public-interest standard is practically insurmountable; the Commission itself is unaware of any case granting relief under it. *Order on Remand*, 18 FERC (CCH) ¶ 61,066 at 61,109. Future rate changes would be a dim prospect, hardly worthy of recognition, if the parties did not intend the just-and-reasonable standard to govern. All but one of the cases cited by petitioner in which a contractual recognition of alteration by regulatory action was held to establish only a public-interest standard involved clauses recognizing the possibility of regulatory change in general, not rate change in particular. *See* cases discussed in *Kansas Cities, supra*, at 87-88. In the one exception,the issue was neither discussed nor understood.[5]

PTUA contends that the contract's provisions for automatic adjustment in the base monthly rate reflect an intent to restrict other rate changes as much as possible. There is some force to that argument, but we cannot say that

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[5]In *Carolina Power & Light Co.*, 47 F.P.C. 1 (1972), the Federal Power Commission adopted a hearing examiner's conclusion that the relevant contract did not permit §205 changes. It was only in connection with that issue that the hearing examiner had considered the regulatory change provision. *Id.* at 13-14. And once that issue was resolved, the Commission automatically scheduled hearings in which the utility was to satisfy the public-interest standard—in the belief that *FPC v. Sierra Pacific Power Co., supra*, made that standard applicable in all §206 proceedings. *Id.* at 4. As our earlier discussion indicates, that early interpretation of *Sierra* was incorrect.

it overcomes the strong textual argument based upon the separate provision for changes before and after the first year of the contract. The automatic adjustments are of course not rendered entirely superfluous if just and reasonable rate revisions are allowed. Since reasonableness is not a fixed point but a zone, *see FPC v. Conway Corp.*, 426 U.S. 271, 278, 96 S. Ct. 1999, 2004, 48 L.Ed.2d 626 (1976); *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 585-86, 62 S.Ct. 736, 742-43, 86 L.Ed. 1037 (1942), there would be scope for operation of the adjustment provisions before the factors producing the adjustment took the rate entirely outside the zone of reasonableness.

Finally, our decision in *Papago I* did not restrict § 206(a) increases under this contract to those in the public interest. The opinion held that the second clause of subsection 3.6 does not permit unilateral rate changes under § 205, but "simply preserves the right of either party to petition the Commission for relief pursuant to Section 206(a)," 610 F.2d at 928. It did not address the standard of proof to be applied in the § 206 proceeding, and indeed explicitly disclaimed any ruling on that point. *Id.* at 930 n. 127. As for its invocation of the canon that ambiguous contracts are to be construed against the drafter: That canon does have force with regard to the point at issue in *Papago I*, since application of § 205 invariably favors the utility. The adoption of a strict or lenient standard for rate change, however, does not necessarily favor either side, since its effect will depend upon whether upward or downward revision is sought. *See Kansas Cities, supra*, at 87.

PTUA also objects to the Commission's refusal to consider evidence extrinsic to the contract with regard to

this issue of interpretation, including such matters as proposals put forward in the negotiations and eliminated in the final contract. We have held with specific reference to this issue or rate revision in federal power contracts that " '[i]n the absence of ambiguity the intent of the parties to a contract must be ascertained from the language thereof without resort to parol evidence or extrinsic circumstances.' " *Appalachian Power Co. v. FPC*, 529 F.2d 342, 347-48 (D.C.Cir.1976) (footnote omitted) (quoting *Simpson Bros. Inc. v. District of Columbia*, 179 F.2d 430, 434 (D.C.Cir.1949), *cert. denied*, 338 U.S. 911, 70 S.Ct. 350, 94 L.Ed. 561 (1950)). And as we have noted in other contexts, "[a] contract is not ambiguous simply because the parties disagree on its interpretation." *Clayman v. Goodman Properties, Inc.*, 518 F.2d 1026, 1034 (D.C.Cir.1973) (footnote omitted). Rather, the "standard for determining ambiguity [that] appears to be in fairly general use by American courts" is whether the contract is " 'reasonably susceptible of different constructions or interpretations.' " *Lee v. Flintkote Co.*, 593 F.2d 1275, 1282 (D.C.Cir.1979) (footnotes omitted) (quoting *1901 Wyoming Ave. Coop. Ass'n v. Lee*, 345 A.2d 456, 461 n. 7 (D.C. 1975)). In rejecting the proffer of extrinsic evidence, the Commission specifically found that "the language of the contract is not reasonably susceptible to the interpretation suggested by PTUA." *Order on Remand*, 18 FERC (CCH) ¶ 61,066 at 61,111. We think it proper to give the Commission the same degree of deference with regard to this issue as we accord it with regard to the ultimate question of the meaning of the contract. In light of the analysis of the contractual terms set forth above, we sustain the refusal to consider extrinsic evidence.

VALIDITY OF THE FINDING THAT EXISTING RATES WERE NOT JUST AND REASONABLE

PTUA makes procedural and substantive attacks on the Commission's holding that the existing rates were not just and reasonable. It argues that the finding that APS would only earn a .552 percent rate of return under the existing rate schedule lacked substantial evidence and that the Commission's reliance on the compliance filing, which was made before the justness and reasonableness of existing rates was at issue, was unfair.

We find the first claim wholly without merit. The Commission's .552 percent figure was derived from the application of standard ratemaking principles to data from the compliance filing. Brief for Respondent at 20 n. 15.[6] PTUA has neither refuted the data nor disputed the principles nor questioned the accuracy of the computation.

PTUA's procedural claim is similarly ill founded. The compliance filing was part of the record, *see* R. 4127-4311. When it was originally submitted, PTUA had ample opportunity and incentive to challenge any inaccuracies. PTUA's assertion that its challenge to the compliance filing "would have been out of order" because it did not contend lack of compliance with the Commission's orders, Reply Brief at 20, is of course circular. If it believed the filing contained significant factual inaccuracies, it could and should have made such a contention. It is true that at the time the compliance filing was made PTUA believed that it would be used only for the purpose of fixing new rates and not in addition for the purpose of showing the

[6]We note that some of the page citations set forth in the Commission's brief for the figures used in this computation are inaccurate; their substance,however, is correct.

unreasonableness of old rates. But that establishes, at most, that PTUA "would have tried harder" if the full ultimate use of the data had been known—a complaint we have elsewhere found inadequate to excuse failure to challenge. *Association of Massachusetts Consumers, Inc. v. SEC*, 516 F.2d 711, 716 (D.C.Cir.1975), *cert. denied*, 423 U.S. 1052, 96 S.Ct. 781, 46 L.Ed.2d 641 (1976). Moreover, the *Order on Remand*, by alluding to the compliance filing, made it clear that it was being used by the Commission to determine the reasonableness of the old rates, and thus provided "sufficient detail to allow for meaningful adversarial comment" in that specific context, *United States Lines, Inc. v. FMC*, 584 F.2d 519, 535 (D.C.Cir.1978). PTUA declined to make such comment in its *Application for Rehearing*, identifying not a single element of inaccuracy in the compliance filing, and making only the same generalized demand put forth here, that a new opportunity for evidentiary hearing was required. *Id.* at 9. Even at the current stage of these proceedings, PTUA notably makes no assertion that the existing rates were in fact just and reasonable. In these circumstances, we are persuaded that even if the Commission's use of the compliance filing were an improper reliance on extra-record evidence, it would not justify invalidation of the agency's action because no substantial prejudice has been shown to result. *See United States v. Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 530, 66 S.Ct. 687, 695, 90 L.Ed. 821 (1946); *Association of Massachusetts Consumers, Inc. v. SEC, supra.*

RETROACTIVITY OF THE COMMISSION'S ORDER

In addition to setting new rates under § 206, the Commission in its January 25, 1982 order made the rates effective from August 1, 1978, the date of its prior rate

determination. The Commission reasoned that

> The effect of this action would be to place all parties in the position they would have been in had the FPC in its prior orders interpreted the PTUA and ED—1 contracts as required by the court's decision. We firmly believe the Commission has the responsibility and authority to place the parties in the same position they would have been in if the FPC had ruled correctly in the first instance.

Order on Remand, 18 FERC (CCH) ¶ 61,066 at 61,110. Section 206(a) of the Federal Power Act empowers the Commission to determine and impose just and reasonable rates only after finding that existing rates are unjust, unreasonable, unduly discriminatory or preferential. In this case the Commission did not make such an explicit finding on August 1, 1978, because it believed it was properly proceeding under § 205, which requires only that the utility's newly filed rates be found just and reasonable, and not that the old ones be found unjust, unreasonable, unduly discriminatory or preferential. The Commission did not explicitly make the latter finding until its January 25, 1982 *Order on Remand*, after we had made clear that the contract would not permit a § 205 proceeding. The Commission then determined that the rates in effect before August 1, 1978 produced an unjust and unreasonable rate of return. *Id.* The final issue we must address is whether the Commission's actions in this regard were sufficient to comply with § 206(a).

The Supreme Court has told us to look to the substance of the requirements of § 206(a) rather than to its rigid formalities, *FPC v. Sierra Pacific Power Co.*, *supra*, 350 U.S. at 353, 76 S.Ct. at 371. In the circumstances of the

present case, we think the substance of a finding of unjustness and unreasonableness was adequately met on August 1, 1978. In its decision of that date, the Commission affirmed, with minor modifications not now relevant, the Initial Decision of its ALJ. *Order Affirming Initial Decision.* That decision had not only found that 9.41 percent was a just and reasonable composite rate of return on capital to be derived from the PTUA contract; but had also found that the joint proposal of Arizona Electric Power Cooperative and PTUA for a 12.25 percent rate of return on *equity* capital was outside the zone of reasonableness. *Arizona Public Service Co.*, 1 FERC (CCH) ¶ 63,045 (Dec. 19, 1977), at 65,332 (*"Initial Decision"*). Even if one assumes that a *zero* rate of return on debt capital could be reasonable (though in fact even PTUA itself suggested 7.43 percent for bonds and 7.90 percent for preferred stock, *see Initial Decision* at 65,329), at the debt-equity ratio found by the Commission (64.46 percent debt to 35.54 percent equity, *see Order Affirming Initial Decision*, 4 FERC (CCH) ¶ 61,101 at 61,211), the 12.25 percent equity figure would have yielded a composite rate of return of 4.35 percent. Thus, even allowing for a wide margin of error, the ALJ had necessarily found that a composite rate of .552 percent was outside the zone of reasonableness.

Even if we assumed that the ALJ's finding on this point was not authoritatively adopted by the Commission, we must still find that a determination of the unreasonableness of a .552 percent rate of return was effectively made in the 1978 Order. To be sure, there is, as we have noted, no single reasonable rate for any contract, but rather a zone of reasonableness, *see FPC v. Conway Corp., supra; FPC v. Natural Gas Pipeline Co., supra*, so that the

Commission's finding that 9.41 percent was just and reasonable did not amount to a finding that every other rate of return was not. But the zone of reasonableness is not endless, or else ratemaking would be a barren exercise and judicial review would be impossible. There is some point at which two rate dispositions are so far apart that they cannot possibly be embraced within the same zone. We are not normally inclined to enter into such an inquiry, but the distinctive circumstances of the present case justify it. We find as a matter of law that rates under a particular contract yielding a .552 percent rate of return and rates yielding a 9.41 percent rate of return—an 1800 percent differential—cannot both possibly fall within the zone of reasonableness. The Commission's 1978 determination that the latter were reasonable therefore amounted to a finding that the former were not.

Thus, either through reliance upon adoption of the ALJ's finding, or through our independent evaluation of the sheer expanse of the differential, we conclude that the Commission determined in 1978 that rates producing a .552 percent rate of return were unreasonable. As we now know, that amounted to a determination that the existing rates were unreasonable; even PTUA does not assert that the return from those rates was sufficiently above the .552 figure to avoid invalidation on the basis described above. The only genuine dispute is whether, in order to permit the new rates to take effect from 1978, the Commission must have *then undergone* the calculation which revealed the fact of a .552 percent rate of return. We think not. If, as the Commission has subsequently found, that was the actual rate of return; and if that rate of return was in 1978 found to be unreasonable; we believe that in the distinctive

circumstances of this case, the substantial purpose of the § 206(a) requirement has been met. We note in this regard that the 1977 ALJ and 1978 Commission opinions which approved APS's rate increase under its contract with PTUA also approved similar increases under APS's other supply contracts, some of which were from the beginning recognized by the Commission to require § 206 procedures. That portion of the opinions which, with regard to those §206 contracts, pertained to consideration and determination of the unreasonableness of existing rates, consisted *entirely* of two paragraphs in the ALJ's *Initial Decision*. First, under the heading "Ultimate Findings and Conclusions":

> (4) Applicant's rates which are the subject of a Section 206 investigation in these dockets, as noted above, are unjust and unreasonable and unlawful, and Applicant should, therefore, be required to file just and reasonable rates as necessary to conform to this decision.

Initial Decision, 1 FERC (CCH) ¶ 63,045 at 65,343. And under the heading "Order":

> Wherefore, *It is ordered*, subject to review by the Commission that: . . .
>
> (B) The existing rates referred to in paragraph (4) above are unjust and unreasonable and unlawful, and shall be changed to conform to this decision.

Id. There is no doubt in our mind that, had it been understood that the present contract was also subject to § 206, it would have been routinely included among the referenced contracts, after routine receipt of the additional factual data necessary for that purpose. One circuit has held

that when new rates are fixed under § 206 "[t]here is no validity to the contention . . . that there must be a finding or determination directed to the old schedule." *Public Service Co. of New Mexico v. FERC, supra,* 628 F.2d at 1270. We are not prepared to go that far; but neither are we prepared to "make a fetish" of the § 206 requirement, *United States v. Pierce Auto Freight Lines, Inc., supra,* 327 U.S. at 530, 66 S.Ct. at 695, by requiring a three and one-half year deferral of a justified rate increase because, although the facts are clear, not all the magic words were uttered.

We emphasize that we will not generally be drawn into the complex analysis here indulged. Whether or not the finding that a new rate is reasonable (or that a proposed new rate is unreasonable) amounts to a finding that the old one was unreasonable, it will ordinarily be an abuse of the Commission's discretion not to make the latter finding explicit; and we will ordinarily inquire no further. We have been willing to probe into the "substance [of] the requirements," *FPC v. Sierra Pacific Power Co., supra,* 350 U.S. at 353, 76 S.Ct. at 371, in the present case only because of the understandable reason for the Commission's failure to comply in form as well as in substance with the terms of the statute (*viz.,* the confusion produced by an unclear contract), and because of the Commission's subsequent explicit finding of unreasonableness which leaves no doubt that we are making a rate judgment with which the Commission fully agrees.

Petition denied.

APPENDIX D

ORDERS OF THE U.S. COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA JANUARY 12, 1984

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term 1983

No. 82-1338

PAPAGO TRIBAL UTILITY AUTHORITY
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION
Respondent

ARIZONA PUBLIC SERVICE COMPANY
Intervenor

And Consolidated Case No. 82-1339

Before: EDWARDS and SCALIA, Circuit Judges and VAN DUSEN, Senior Circuit Judge, U.S. Court of Appeals for the 3rd Circuit.

January 12, 1984

ORDER

On consideration of the Petition for Rehearing of Petitioner, filed December 27, 1983, it is

Ordered by the Court that the aforesaid Petition is denied.

Per Curiam

For The Court:

GEORGE A. FISHER, CLERK

By:
ROBERT A. BONNER
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-1338

PAPAGO TRIBAL UTILITY AUTHORITY
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION
Respondent

Arizona Public Service Company
Intervenor

And Consolidated Case No. 82-1339

Before: ROBINSON, Chief Judge; WRIGHT, TAMM, WILKEY, WALD, MIKVA, EDWARDS, GINSBURG, BORK, SCALIA and STARR, Circuit Judges, and VAN DUSEN, Senior Circuit Judge, U.S. Court of Appeals for the 3rd Circuit.

January 12, 1984

ORDER

The Suggestion for Rehearing *en banc* of Petitioner, filed December 27, 1983, has been circulated to the full Court and no member has requested the taking of a vote thereon. On consideration of the foregoing, it is

Ordered by the Court *en banc* that the aforesaid suggestion is denied.

Per Curiam

For The Court:

GEORGE A. FISHER, CLERK

By:
ROBERT A. BONNER
Chief Deputy Clerk

APPENDIX E
Statutes

APPENDIX E

Federal Power Act
Section 205, 16 U.S.C. § 824d.

§824d. Rates and charges; schedules; suspension of new rates

(a) All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the

expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

Federal Power Act
Section 206, 16 U.S. C. §824e.

§824e. Power of Commission to fix rates and charges; determination of cost of production or transmission

(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.

(b) The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy.

APPENDIX F
APS-PTUA CONTRACT

WHOLESALE POWER SUPPLY AGREEMENT PAPAGO TRIBAL UTILITY AUTHORITY

THIS AGREEMENT,entered into this 28th day of May, 1971, by and between ARIZONA PUBLIC SERVICE COMPANY, an Arizona corporation (hereinafter called "Company"), and THE PAPAGO TRIBAL UTILITY AUTHORITY, acting by authority granted from the Papago Council, (hereinafter called "PTUA");

WITNESSETH:

WHEREAS, the PTUA and the Papago Tribe desire to facilitate mining and industrial development on the Papago Reservation and the furnishing of electricity for such purposes and for other purposes on the Papago Reservation; and

WHEREAS, the Papago Tribe has heretofore granted certain mining rights, leases and privileges to Hecla Mining Company and Newmont Mining Company, and it is contemplated that the development of such mines and refining, smelting and related activities will be of benefit to the Papago Tribe, and the Papago Tribe desires to foster and encourage such development; and

WHEREAS, the PTUA plans to furnish electric power for such mining, milling, smelting and related operations and to distribute power elsewhere on the Reservation, and the PTUA desires to purchase its total power requirements for such purposes from the Company in an amount up to 25 MW, unless increased as provided in Section 2.2 hereof; and

WHEREAS, in order to facilitate and permit the achievement of the plans hereinabove referred to, the following Agreement is hereby entered into:

1. **Specific Facilities to be Provided.**

1.1 The delivery point for power sold to the PTUA hereunder shall be the point of division of ownership of the electric facilities of Company and the electric facilities of the PTUA, at approximately the location indicated on the plat attached hereto as Exhibit A, said power to be delivered at approximately 230 Kv, with Company to own and maintain and operate the necessary facilities on its side of the delivery point for the delivery of electricity to the PTUA at the delivery point. The PTUA will provide, at no cost to the Company, necessary right of way for any lines or substation sites necessary to deliver power to the delivery point. The PTUA will provide, maintain, and operate or cause to be provided, maintained, and operated the necessary facilities to permit it to receive electricity at the delivery point.

1.2 The parties respectively will plan and carry out the construction schedules for the aforesaid facilities with the purpose of both being ready for the commencement of electric deliveries hereunder at the delivery point on the commencement date hereinafter stated.

2. **Power Supply.**

2.1 Company will supply or make available, and PTUA will take or pay for electric power and energy in the amount of its requirements up to a maximum demand (defined hereafter) of 25 MW, unless said limit is changed as provided in Section 2.2. Electric service supplied hereunder shall be in the form of three-phase, 60-cycle electricity at a nominal voltage of approximately 230 KV.

2.2 In the event PTUA shall desire to increase the maximum demand as specified in Section 2.1, it may do so by notice given in writing two (2) years in advance of the

effective date of such increase; provided, however, tha Company shall have the right to refuse to accept such proposed increase in demand by notice given to PTUA within thirty (30) days after receipt of notice of such desire to increase the maximum demand. In the event that the PTUA should procure a source of energy to supply such amount in excess of 25 MW, whether from an outside supplier or by means of acquiring its own generating facilities, the PTUA agrees that such power and energy from such other source or its own generating facilities shall not be utilized in place of nor operated in parallel with the power and energy which the PTUA is obligated to purchase hereunder and which the Company is obligated to supply or make available.

2.3 Once a peak demand (hereinafter defined) has been established, which is higher than the maximum demand, specified in Section 2.1, whether or not inadvertent or occurring without notice or consent of Company, this shall constitute a new maximum demand for the current billing period and for all subsequent billing periods hereunder, unless and until increased pursuant to the terms and conditions of this contract, subject to the right of Company to have the maximum demand in effect prior to such peak demand remain in effect unaffected by the existence of such peak, and, in addition PTUA shall reimburse Company for any expenses or damages incurred by Company, as a result, of the occurrence of such peak demand.

2.4. PTUA will exercise due diligence to assure that the electrical characteristics of its load, such as deviation from sine wave form or unusual short interval fluctuations in demand, shall not be such as to result in impairment of service to other customers or in interference with operation of telephone, television or other communication facilities. The deviation from phase balance will not be greater than

ten (10) per cent of the demand at all times. Each party shall supply the reactive power requirements for its own system and there shall be no transfer or flow of reactive Kilovolt-amperes at points of interconnection hereunder except when transfer of reactive Kilovolt-amperes may be agreed upon from time to time by authorized representatives of the contracting parties.

2.5. **Use on Reservation Only.** Electric power and energy to be supplied by Company to PTUA hereunder shall be solely for consumption and use within the Papago Reservation.

3. **Rates for Power Supply.**

3.1. The rates applicable during the initial one (1) year period hereof and thereafter unless and until changed as hereinafter provided in Section 3.6 hereof, for power and energy delivered to PTUA hereunder, will be computed in accordance with the following rate provisions, subject to changes from time to time as hereinafter provided:

(a) **Base Monthly Rate:**

(i) Local Facilities Charge:

1.55% of local investment (as hereinbelow defined), plus

(ii) Demand Charge:

$2.915 per KW of billing demand, plus

(iii) Energy Charge:

$0.0024 per Kwh

(b) **Base Monthly Minimum:**

(i) Local Facilities Charge, plus

(ii) Demand Charge

(c) **Monthly Adjustments:**

(i) The demand and local facilities charge of the monthly rate shall be adjusted up or down each month by adding or subtracting an amount as provided in Section 3.3.

(ii) The energy charge shall be subject to adjustments based on the cost to Company's electric operations for any changes in the prices of fuel consumed in electric generating plants owned by or supplying energy to the Company from prices in effect March 1, 1962, for then existing plants, or on the dates of initial commercial operation for subsequent and future plants as more specifically detailed in the amended Plan for Administration of Adjustment for Cost of Fuel filed from time to time with the Federal Power Commission.

(iii) The total monthly bill shall be subject to the applicable proportionate part of any taxes or governmental impositions which are or may in the future be assessed on the basis of gross revenue of Company and/or the price of revenue from the electric energy or service sold and/or the volume of energy generated or purchased for sale and/or sold hereunder.

(d) **Monthly Billing Demand:**

The monthly billing demand will be the higher of the following:

(i) The highest 30 minute integrated demand (KW) measured during the 24 months ended with the billing month, or

(ii) The contract demand (hereinafter defined).

3.2 The quantities of power and energy delivered shall consist of the amount of electricity delivered as determined from the monthly meter readings at the delivery point.

3.3 The monthly adjustments to be added to or subtracted from the Local Facilities Charge and the Demand Charge in accordance with Paragraph 3.1 (c) (i) are intended to reflect the effect on Company's cost of service of changes in applicable (a) ad valorem tax rates and/or assessment ratios, (b) Federal and State income tax rates, (c) prices for materials and supplies, and (d) labor rates. These monthly adjustments will be computed in accordance with Exhibit B attached hereto and made a part hereof.

3.4 Reduction in Maximum Demand and Payment for Unused Capacity.

In the event that Hecla Mining Company and/or Newmont Mining Company shall exercise rights under their respective power purchase contracts with PTUA so as to cancel their respective purchase obligations under either or both such contracts effective at any time after ten (10) years from the effective date of this Agreement, PTUA shall have the right, by written notice, given within three (3) months after notice by Hecla or Newmont, as to exercise of such cancellation right, to effect a reduction hereunder

equivalent in amount to the amount cancelled under such purchase contract or contracts, provided that in such event, PTUA shall forthwith pay the Company for unused power production and integrated transmission system capacity according to the following terms and conditions:

A. The previously established maximum demand KW will be reduced by the amount specified in the notice given by PTUA to establish a new maximum demand KW. Thereafter the maximum demand KW will be determined according to the provisions of Section 2 hereof.

B. Payment for unused production and integrated transmission system capacity:

1. PTUA shall pay the Company for unused production and integrated transmission system capacity as follows:

a. In the event PTUA gives the Company seven (7) years notice there shall be no charge.

b. In the event PTUA gives the Company less than seven (7) years notice, PTUA shall pay the Company for unused power production and integrated transmission system capacity as computed by the following formula:

$$A = 9dk(7-n)$$

where:

A = dollar amount of payment

d = dollars per KW of Demand Charge specified in Section 3.1(a)

$k = K_1 - K_2$.

where:

K_1 = maximum demand KW established in Section 2.

K_2 = new maximum demand KW established under Paragraph A.

n = number of years notice given, not to be more than six (6) years or less than two (2) years.

C. Notice must be given not less than two (2) years prior to the date of the requested reduction in maximum demand. Such notice must be in writing and sent by registered mail to the Company's general offices in Phoenix, Arizona.

D. Billing under this Section is to be on or after the effective date of the reduction in maximum demand, and payment shall be due fifteen (15) days after date of billing. Amounts not paid on or before the due date shall be payable with interest accrued at a monthly rate of 1.0% compounded monthly from the due date to the date of payment.

3.5. **Definitions.**

"Local Investment" - the cost to Company of the facilities and related metering equipment installed to deliver energy from the Company's integrated transmission system to the respective delivery points hereunder.

"Company's Integrated Transmission System" - the present or future integrated transmission system of Company, consisting of circuits of 230 KV or higher, which interconnect the Company's generating stations.

"Peak Demand" - the highest 30 minute integrated demand measured at the delivery point during any month.

"Maximum Demand" - the maximum demand is the maximum number of Kilowatts that PTUA is entitled to receive and the maximum number of Kilowatts that Company is obligated to furnish.

"Contract Demand" - the contract demand is equal to the peak demand until December 31, 1975, or until it reaches 2/3 of the maximum demand thereafter the contract demand is equal to 2/3 of the maximum demand specified in Section 2.1, or modified as provided in Section 2.2 and Section 2.3.

3.6. The rates hereinabove set out in this Section 3 and Exhibits thereto are to remain in effect for the initial one (1) year of the term of this contract and thereafter unless and until changed by the Federal Power Commission or other lawful regulatory authority, with either party hereto to be free unilaterally to take appropriate action before the Federal Power Commission or other lawful regulatory authority in connection with changes which may be desired by such party.

4. **Billing and Payment.**

4.1. Company will endeavor to render bills to PTUA on or before the 15th day of each calendar month for services furnished during the preceding billing month. In such bills, Company may designate certain items as being on an estimated basis due to unavailability of final underlying data, in which event adjustments to the correct amounts, when correct amounts are determined, shall be included in a bill for a subsequent month. Billing month for purposes hereof shall be a calendar month.

4.2. Payment by PTUA to Company shall be due on the 25th day of the calendar month following the billing month,

or on the 10th day after mailing of bill, whichever day be later. Amounts not paid on or before the due date shall be payable with interest accrued at the rate of 1% a month compounded monthly from the due date to the date of payment.

Payment to the account of the Company shall be effected by or on behalf of the PTUA at the Downtown office of the First National Bank of Arizona, in Tucson, Arizona. The PTUA agrees, in consideration of the Company's entering into this agreement, that it will irrevocably, during the term of this agreement, direct the Hecla Mining Company and the Newmont Mining Company, their successors and assigns, to which the PTUA expects to resell a substantial amount of the power and energy purchased by it from the Company hereunder, that payments due to the PTUA for sales of electric power and energy by the PTUA to said mining corporations be paid to the said Downtown office of the said bank, for the account of the PTUA, and further that the PTUA agrees to irrevocably direct the said Bank to make monthly payments to the Company out of the amounts so paid to the account of the PTUA at said Bank by the mining corporations, the amount of payment to be made to the Company to be that shown to be due on the bills to be submitted by the Company to said Bank each month. This agreement is contingent upon an instrument setting out in full the terms and conditions relating to the said payments by the mining corporations to the said Bank and the payment by the said Bank to the Company, signed on behalf of the Bank, the mining corporations, the PTUA and the Company, and approved by the Tribal Council, such instrument shall be in accordance with the terms and procedures set forth in Exhibit C attached hereto and made a part hereof.

4.3. In case a portion of any bill be in dispute, the PTUA shall notify the payment bank of such fact and of the amount in dispute, and only the undisputed amount shall be paid to the Company when due, and the remainder, if any, shall be held by the Bank and, upon determination of the correct amount, shall be paid promptly after such determination, with interest accrued as aforesaid from the original due date.

4.4. If failure by PTUA to pay any amount due, and not in bona fide dispute, shall continue for thirty (30) days after demand of Company for payment, Company shall have the right to suspend power delivery hereunder until all amounts due have been paid. Such suspension shall not relieve PTUA of any amounts previously due or of any minimum bills due in the future, nor shall such suspension invalidate any other agreements with the PTUA.

5. **Measurement of Power.**

5.1. Company will own and maintain the metering equipment for measuring the flow of power and energy delivered hereunder at the point of delivery.

5.2. Company will at its own expense make such periodic tests, at least once each year, and inspection of its meters as may be necessary to maintain a commercial standard of accuracy, will restore to a condition of accuracy any meters found to be inadequate, and will advise PTUA promptly of the results of any such test which show any inaccuracy more than 2% slow or fast. PTUA shall be given notice of, and may have representatives present at, such tests and inspections. Company will make additional tests of its meters at the request of PTUA and in the presence of PTUA's representatives. If any such periodic or additional

tests show that a meter is inaccurate by more than 2% slow or fast, correction shall be made in the billing to the PTUA for the previous billing month, or from the date of the latest test if within the previous billing month, and correction shall be made in meter records for the elapsed period in the month during which the test was made. The cost of any additional test requested by PTUA shall be borne by PTUA if such test shows a meter accurate within 2% slow or fast, and by Company if such test shows a meter inaccurate by more than 2% slow or fast. If at any time a meter should fail to register or its registration should be so erratic as to be meaningless, the estimated correct registration for billing purposes shall be based on records of check meters, if available, or otherwise upon the best obtainable data.

5.3. Representatives of PTUA shall be afforded opportunity to be present at monthly readings of kilowatt-hour meters involved in settlements hereunder, and to examine records of demand meters.

6. **Arbitration.**

6.1. **Reference to Arbitration.** In the event the parties should be unable to reach agreement with respect to any matter arising under or in connection with this agreement, either party may call for submission of such matter to arbitration in the manner herein set forth. The party calling for arbitration shall give notice to the other party, setting forth in such notice the issues to be arbitrated, and within ten (10) days from receipt of such notice, the other party may give notice to the first party setting forth additional related issues to be arbitrated.

6.2. **Appointment of Arbitrators.** Within fifteen (15) days from its notice calling for the arbitration, the first party shall appoint a person to serve as one arbitrator with notice to the other party of such appointment, and, within fifteen

(15) days after receipt of notice of appointment of the first arbitrator, the other party shall appoint a person to serve as a second arbitrator with notice to the first party of such appointment. The two persons so appointed shall then agree upon and secure a third arbitrator. If the third arbitrator should not be secured within fifteen (15) days from the appointment of the second arbitrator, or if the second arbitrator should not be appointed within fifteen (15) days from the appointment of the first, either party, with notice to the other party, may request the Secretary of the Interior to appoint the third arbitrator, or the second and third arbitrators, as the case may be. In case the Secretary should decline to act upon such request or for twenty (20) days should fail to act, then either party, with notice to the other party, may call upon American Arbitration Association for such appointment or appointments.

6.3. **Arbitration Procedure.** The arbitrators so appointed shall hear the evidence submitted by the respective parties and may call for additional information, which additional information the party called upon shall furnish to the extent feasible. A determination signed by a majority of the arbitrators shall be conclusive with respected to the issue submitted and shall be binding upon both parties.

6.4. **Expenses of Arbitration.** Each party shall bear the fee and personal expenses of the arbitrator appointed by it or for it, together with the fees and expenses of its counsel and its own witnesses, and all other costs and expenses of the arbitration shall be borne in equal parts by the parties, unless the decision of the arbitrators shall specify a different apportionment of any or all of such costs and expenses.

7. **Special Provisions.**

7.1. In order to induce Company to enter into this Wholesale Power Supply Agreement between the Company

and the PTUA, and the Construction Agreement, and the Operating and Maintenance Agreement, dated concurrently herewith, providing for the construction and maintenance by it on behalf of the PTUA, of facilities located on the Papago Reservation for transmission of electricity from the delivery point under the Wholesale Power Supply Agreement to the point at which the electricity is delivered by the PTUA to the Hecla Mine and the Newmont Mine, the PTUA and the Papago Tribe hereby covenant as follows:

7.2. The Tribe will not tax, assess or regulate in any manner whatsoever the property of the Company located on the Reservation or the Company's activities under this Wholesale Power Supply Agreement or the Operating and Maintenance Agreement, or the Construction Agreement, or the transmission facilities on or off the Reservation, or the transmission, sale or disposition of power at such delivery point or over such facilities, or any activities entered into thereunder or any operating, maintenance or replacement work done in connection therewith.

7.3. The PTUA and the Papago Tribe hereby agree, that in the event of a dispute arising hereunder not settled by arbitration, such dispute shall be submitted to the jurisdiction of the Courts of the State of Arizona or Federal Courts.

7.5. **Separability.** In the event that any of the terms or conditions of this Agreement, or the application of any term or condition to any person or circumstance, shall be held invalid by any Court having jurisdiction in the premises, the remainder of this Agreement, and the application of such terms and conditions to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

8. **General Provisions.**

8.1. **Uncontrollable Forces.** Company shall not be held responsible or liable for any loss or damage to PTUA on account of non-delivery of power hereunder occasioned by uncontrollable forces, the term "uncontrollable forces" meaning for purposes hereof, causes beyond Company's control, including, but not limited to, failure of facilities, flood, earthquake, storm, lightning, fire, explosion, epidemic, war, riot, civil disturbance, labor stoppage, sabotage, or restraint by court or public authority, which by exercise of due diligence it shall be unable to overcome. Company will, however, exert every practicable effort to assure continuing of power supply to PTUA. Nothing herein shall be construed to obligate Company to forestall or settle a strike against its will.

8.2. **Responsibility as to Use of Service or Apparatus.** Company and PTUA each assume all responsibility on their respective sides of the points of delivery for the electric service supplied to PTUA hereunder, as well as for any apparatus used in connection with such supply. Company and PTUA each will save the other harmless from and against all claims for injury or damage to persons or property on their respective sides of the points of delivery, occasioned by or in any way resulting from the electric service supplied hereunder or the use thereof.

8.3. **Waivers.** A waiver at any time by a party of its rights with respect to default, or with respect to any other matter arising in connection with this agreement, shall not be deemed a waiver with respect to any subsequent default or matter.

8.4. **Notices.** All formal notices, demands or requests given or made under this agreement shall be in writing and shall be deemed properly given or made if delivered personally or sent by registered mail, certified mail or telegram to the person designated below:

Notices to Company:

Secretary of the Company
Arizona Public Service Company
501 South Third Avenue
Phoenix, Arizona

Notices to the PTUA:

Chairman of the Papago Tribal Utility Authority
Papago Tribal Utility Authority
500 Transamerica Building
Tucson, Arizona

9. **Term.**

9.1. **Effective Date.** Company and PTUA will endeavor to have the necessary facilities for delivery and receipt of service hereunder ready for commercial operation by April 15, 1972. In the event the Company has constructed the facilities necessary to enable it to render service hereunder, payment by the PTUA to the Company pursuant to the rates hereinabove set out shall commence on April 15, 1972, or, if the approvals referred to in Section 10 have not been procured by that date, as soon thereafter as such approvals have been received, whether or not the PTUA is ready to receive service, regardless of the reason therefor. In no event, however, shall this agreement become effective unless and until the mines have duly executed guarantees of the performance and payment of this contract by PTUA.

9.2 **Duration.** This agreement shall run for an initial period of thirty (30) years from April 15, 1972.

9.3. **Extension of Term.** This agreement shall automatically continue for successive periods of ten (10) years each beyond the initial period, unless and until cancelled by either party as of the expiration date of the initial period, or of any extension period, by notice given not less than five (5) years in advance of the intended termination date.

10. **Approvals.** It is understood that to become effective (i) the aforesaid power supply agreement shall have been executed and approved, and (ii) this agreement shall have been approved by the Papago Tribal Council and the Council Resolution approving this agreement shall have been approved by the Superintendent and reviewed by the Secretary of the Interior. In addition, to the extent that the Federal Power Commission may have jurisdiction pursuant to the Federal Power Act, this agreement is subject to that Commission and to the procuring by Company of any requisite authorization or acceptance for filing as a rate schedule or other action by that Commission.

11. **Guarantee by Mines.** This agreement is contingent upon Hecla Mining Company and/or Newmont Mining Company each having furnished to the Company a guarantee of payment by the PTUA, in form and substance satisfactory to the Company, with due authorization of their respective Boards of Directors.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed as of the day and year first above set out.

ARIZONA PUBLIC SERVICE COMPANY

By: /s/ Keith L. Turley

Its Executive Vice President

THE PAPAGO TRIBAL UTILITY AUTHORITY

By /s/ Arnold F.Smith

Its Vice Chairman

ATTESTED:

/s/

Secretary

ATTESTED:

/s/

Secretary

APPROVED pursuant to RESOLUTION NO. 18-71 of The Papago Council

THE PAPAGO TRIBE

/s/ _____

Augustine B. Lopez
Chairman
The Papago Council

ATTEST:

/s/ _____

Secretary

DATE: 6/29/71

EXHIBIT A
[map not reproduced]

WHOLESALE POWER SUPPLY AGREEMENT

PAPAGO TRIBAL UTILITY AUTHORITY

EXHIBIT B

Base Monthly Rate Local Facilities Charge and Demand Charge Adjustment Formulae

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A. Monthly Local Facilities Charge Adjustment

(i) The adjustment for changes in income tax rates shall equal

0.26% × local investment multiplied by

$$\left[\left(\frac{100 - 50.109}{50.109} \times \frac{T}{100 - T}\right) - 1\right]$$

where:

T = the composite federal and state income tax rate in per cent that is applicable to APS' taxable income during the billing month.

(ii) The adjustment for changes in ad valorem tax rates and/or assessment ratio shall equal

0.24% × local investment multiplied by

$$\left[\frac{T \times R}{0.02827} - 1\right]$$

where:

T = the tax rate for the applicable school districts (including state, county and local rates) for the

calendar year that includes the current billing month.

R = the assessment ratio applicable to APS on its operating properties during the billing month.

(iii) The adjustment for changes in the price of materials and supplies and labor rates shall equal

0.12% × local investment multiplied by

$$\left[\frac{0.442A}{115.1} + \frac{0.558B}{5.59} - 1\right]$$

where:

A = the U.S. Bureau of Labor Statistics Wholesale Price Index for the calendar month preceding the billing month.

B = the average hourly earnings for utility employees in Arizona for the calendar month preceding the billing month as computed and published by the Arizona Employment Security Commission Unemployment Compensation Division.

B. Monthly Billing Demand Adjustment

(i) The adjustment for changes in income tax rates shall equal

$$0.5285 \left[\left(\frac{100 - 50.109}{50.109} \times \frac{T}{100 - T}\right) - 1\right] \quad \$/Kw$$

where:

T = the composite federal and state income tax rate in per cent that is applicable to APS' taxable income during the billing month.

(ii) The adjustment for changes in ad valorem tax rates and/or assessment ratio shall equal

$$0.3387 \left[\left(\frac{T \quad R \quad B}{0.01537}\right) - 1\right] \quad \$/Kw$$

where:

T = the weighted average tax rate for the calendar year that includes the current billing month for all Arizona ad valorem taxes as computed and published annually by the Arizona State Tax Commission.

R = the assessment ratio applicable to APS on its operating properties during the billing month.

(iii) The adjustment for changes in the price of materials and supplies and labor rates shall equal

$$0.5850 \left[\frac{0.5A}{115.1} + \frac{0.5B}{3.59} - 1\right] \quad \$/Kw$$

where:

A = the U.S. Bureau of Labor Statistics Wholesale Pric Index for the calendar month preceding the billing month.

B = The average hourly earnings for utility employees in Arizona for the calendar month preceding the billing month as computed and published by the Arizona Employment Security Commission Unemployment Compensation Division.

C. Corrections of Formulae

In the event of changes in tax laws, allowable income tax depreciation rates, methods of computing taxes or changes in any other circumstances which cause the above formulae to become inapplicable or to produce improper results, the parties will compute and agree on new formulae which will properly reflect the intent of such formulae. If the price and labor indexes specified above become unavailable or have their bases changed, the parties will agree on new indexes and/or proper adjustments to the formulae to reflect such changes.

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of April, 1984, three copies of this Appendix to Petition for a Writ of Certiorari were mailed, postage prepaid, to all counsel of record for the parties below.

_____

Arnold D. Berkeley